Supreme Court, U.S.
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CASE NO. 91-1624

In The
Supreme Court of the United States

October Term, 1991

LLOYD and WANDA KOLOKOFF,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On appeal to the United States Court
of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

THE VOGELSANG LAW FIRM
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QUESTION PRESENTED FOR REVIEW

The question presented for review in this petition for writ of certiorari is whether sovereign immunity protects the United States from liability for the negligent acts of the federal government in admitting a violent criminal into the Federal Witness Security Program, failing to warn the public of the dangerous propensities of said protected witness, and failing to terminate said witness' protection despite repeated fraudulent and criminal acts by the witness while in the program.

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OPINION BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is unreported and is reprinted in the Appendix to the Petition for Certiorari and appears at

page 1. The final order granting motion to dismiss and/or for summary judgment of the United States District Court for the Southern District of Florida is unreported and is reprinted at page 2 in the Appendix.

JURISDICTION

This Court has jurisdiction to review the judgment by writ of certiorari pursuant to 28 U.S.C. § 1254(1). The judgment of the United States Court of Appeals for the Eleventh Circuit was entered on January 14, 1992.

QUESTION PRESENTED

Whether the discretionary function exception to the Federal Tort Claims Act provides blanket immunity to the United States from liability for the negligent acts of its officers, agents and employees in implementing and applying the federal witness security program.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves 28 U.S.C. § 1346(b)(1988), the Federal Tort Claims Act (FTCA); 28 U.S.C. § 2680 (a),

the discretionary function exception to FTCA; Title IV of the Organized Crime Control Act, Pub.L.No. 91-452 Section 502, 84 Stat. 933; Justice Department Order OBD 2110.2: Witness Protection Maintenance Policy and Procedures; and the Witness Security Reform Act of 1984, effective October 1, 1984 (Pub.L.No. 98-473, Title II, Part F, Subpart A, Sections 1207-10, 98 Stat. 2153-63 (creating 18 U.S.C. § 3521-28)(1984).

STATEMENT OF THE CASE

Course of Proceedings and Dispositions Below

The petitioners, LLOYD AND WANDA KOLOKOFF ("KOLOKOFF") were the plaintiffs in the trial court. On April 25, 1990 KOLOKOFF filed a complaint against the respondent, UNITED STATES OF AMERICA ("USA") (V.1, R. 1). The complaint sought recovery against USA for the alleged negligence of two of its agencies, the United States Department of Health and Human Services, Social

Security Administration ("SSA") and the Department of Justice ("DOJ")(V. 1, R. 1). On May 12, 1990, USA filed a motion to dismiss and/or for summary judgment (V. 2, R. 24). After extensive memoranda of law and oral argument (V. 1 and 2, R.19, 20, 24, 41), the district court granted USA's motion to dismiss and/or for summary judgment on February 7, 1991, holding that KOLOKOFF'S[1] claim was barred by the discretionary function exception to FTCA, or in the alternative, it was barred by the intentional tort exception to FTCA, and that KOLOKOFFS further failed to state a claim upon which relief may be granted (V. 2, R. 39). KOLOKOFFS appealed the summary judgment to the Eleventh Circuit Court of Appeals which held that "While we doubt that the intentional tort exception applies, we still AFFIRM for

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[1] In this Petition, the following abbreviations will be used in citations to the docket: V. for Volume, R. for Docket number, P. for Page number.

the other reasons stated by the district court." (App. 1-2).

Statement of the Facts

On October 26, 1987, Arthur Kane, a witness in the Witness Security Program ("WSP"), shot and paralyzed LLOYD KOLOKOFF. KOLOKOFF worked for Merrill Lynch and had been Kane's stockbroker for several years prior to the shooting. Kane, a heavy trader in the stock market, had become despondent after incurring severe financial losses in the 1987 stock market crash. He came to the Merrill Lynch office where KOLOKOFF worked to deliver a check for money he owed Merrill Lynch for a margin call on Kane's accounts and shot and killed the Merrill Lynch branch manager, Jose Argilagos, shot KOLOKOFF rendering him a paraplegic, then shot and killed himself.

Prior to the shooting KOLOKOFF did not know that Kane was a federally protected witness or convicted felon whose name, identity, and social security number

had been changed by the Department of Justice. It was later discovered that before and during his admission into the WSP, Arthur Kane had displayed symptoms of violence and mental imbalance, including a suicidal gesture in the late 1960s when his secretary walked into Kane's office and observed him at his desk with a gun in his mouth after a loss in the stock market (V. 1, R. 18, Exhibit 1 at 11-12) and other instances when he talked about driving his Jaguar so fast as to smash it against a concrete bridge (V. 1, R. 18, Exhibit 1 at 34, 50). Later, when Kane was in the midst of his criminal problems and being investigated for insurance fraud, ambulance chasing and postal fraud crimes, he confided in his secretary that he "was either going to kill himself and leave big insurance for his daughters or he was going to go into a federal witness protection program." (V. 1, R. 18, Exhibit 1 at 16).

Prior to his criminal indictment, Kane took a chiropractor, a Dr. Ronald Alsop, who was also being investigated for insurance fraud, for a two hour car "tour" of Kansas City. During the "tour" he showed Alsop a gun and threatened him and his family if he cooperated with the government investigation. He also indicated he would kill himself if he was indicted (V. 1, R. 18, Exhibit 2). Kane's and Alsop's sworn testimony surrounding this incident was admitted into evidence at a hearing in the criminal prosecution of Kane's law partner, Ariel Henry Tager, in the United States District Court for the District of Kansas, Case No. 78-20052-01. David B.B. Helfrey was the Special Attorney from the DOJ who supervised both the Kane and Tager prosecutions.

In 1976, DOJ admitted Arthur Kane into the WSP, despite his violent background. He and his family were provided with new identities, relocated to Miami, Florida, and Kane was furnished employment with the SSA. DOJ

required Kane to sign a "Memorandum of Understanding" outlining proscribed behavior by federally protected witnesses (V. 2, R. 32). The Memorandum of Understanding stated that any involvement in criminal activity would result in the immediate termination of a witness from the program, that the Federal Government would not shield witnesses from creditors, and that any debts that the witness incurred prior or subsequent to entry into the program had to be satisfied (V. 2, R. 32).

While in the program, Kane continued on a course of criminal and fraudulent behavior with the knowledge and acquiescence of DOJ. Despite the "rigid guidelines" contained in the Memorandum, Kane was given continued protection and job security by DOJ. In December of 1977, White Weld & Company, Inc., a stock brokerage business in Missouri, filed suit against Arthur and Judith Katz (Kane), alleging that Kane had made stock trades and transfers in September of 1977, failed to meet the margin

requirements of White Weld, and fraudulently conveyed, assigned and concealed property to defraud creditors (V. 1, R. 18, Exhibit 3). Kane's stockbroker at that time, Richard Fuller, filed an affidavit in the proceeding stating that in June of 1977, Arthur Kane transferred stocks and cash into his wife's name to conceal his assets from creditors (V. 1, R. 18, Exhibit 4; Exhibit 5 at P. 9). DOJ was placed on notice of Kane's criminal and fraudulent acts as it assisted White Weld in perfecting service against Arthur and Judith Kane (V. 1, R. 18, Exhibit 6). Stockbroker, Richard Fuller, also described an incident where Kane "jokingly" threatened Fuller that if the stock position he had recently acquired did not turn around, Kane would shoot Fuller (V. 1, R. 18, Exhibit 5 at P. 20, 21). DOJ took no action and Kane continued on his criminal course.

On August 12, 1978, a banking corporation named Irving Trust Company, filed suit against Arthur Kane (V.

1, R. 18, Exhibit 7), alleging that in February of 1977, Kane defrauded it of over $200,000 which had been mistakenly credited to Kane's bank account. DOJ was notified of this fraudulent and criminal activity by Kane as documented by numerous letters and memoranda contained in DOJ's file on Arthur Katz (V. 1, R. 18, Exhibit 8), yet took no action to terminate Kane from the WSP.

For approximately one month prior to the shooting of October 26, 1987, Arthur Kane complained at work to his supervisor, Joseph Scott, about stomach pains and feeling ill. He missed work several times that month because of his ailments and he was out of work on sick leave during the entire week preceding October 26, 1987 (V. 1, R. 18, Exhibit 9 at 15; Exhibit 10 at 4). On the morning of October 26, 1987, at approximately 7:30 A.M., Kane called his supervisor, Scott, and asked whether his life insurance policy through the SSA would

pay benefits in the event of suicide (V. 1, R. 18, Exhibit 10 at 5). Scott and his supervisor, Richard Gourley, went to Kane's home because they were concerned about the call (V. 1, R. 18, Exhibit 9 at 21, 22; Exhibit 10 at 5-7). When Kane answered the door, he appeared distraught, he kept bending over grabbing his stomach stating that he was in great pain (V. 1, R. 18, Exhibit 10 at 7). Kane told Scott and Gourley that he had lost a great deal of money in the stock market and that was why he was so upset (V. 1, R. 18, Exhibit 10 at 9). He also told Scott that "it was really easy to buy a gun in this town." (V. 1, R. 18, Exhibit 9 at 37, 38). After leaving Kane's house, Scott and Gourley stopped by a neighborhood synagogue, Temple Beth Am, and spoke to a Rabbi about Kane's suicide threat, their concerns for his well-being, and to elicit some assistance (R. 18, Exhibit 9 at 41, 42). Later that morning, Scott learned from a fellow employee that Kane had gone to the Merrill Lynch office, shot and killed

the branch manager, shot and paralyzed the Petitioner, Lloyd Kolokoff, and shot and killed himself (Exhibit 9 at 42).

The KOLOKOFFS brought two separate and distinct claims against the United States pursuant to the Federal Tort Claims Act. The first claim against SSA alleged negligence by its employee, Joseph Scott, for failing to take reasonable and necessary measures to prevent and or warn of the shooting by Arthur Kane. The KOLOKOFFS' second claim was against DOJ for negligently admitting and or keeping Arthur Kane in the federal witness protection program, providing continued protection to him despite knowledge of his ongoing criminal and fraudulent behavior, failing to perform a psychological evaluation or a balancing test while continuing his protection, and failing to terminate him from the program despite his violation of the regulations set forth in the Memorandum of Understanding. The trial

court held that the discretionary act exclusion and/or the intentional act exclusion barred KOLOKOFF's claims, and the court of appeals affirmed on the basis of the discretionary act exclusion.

REASONS FOR GRANTING THE WRIT

Certiorari should be granted to determine an important question of federal law which has not been but should be settled

The issue in this case is whether the discretionary function exception to the FTCA bars all tort actions arising out of the application of the Witness Security Program. At a time when potential government witnesses abound with assorted violent and criminal backgrounds, from Arthur Kane, to murderer/armed robber Marion Pruett[2], the effect of the court's ruling below is to preclude any review, not only of who is admitted into the WSP, but also as to what supervision is given, when and to whom warnings are given, and when a witness is

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[2] Taitt v. United States, 770 F.2d 890 (10th Cir. 1985)

terminated from protection. Blanket immunity is provided to all actions or inactions of government officials or employees not only for their policy judgments, but also for all conduct related to implementation of the WSP. Even where specific policies and procedures governing the proper course of conduct is deviated from, no review is permitted under the circuit court's ruling.

28 U.S.C. § 1346(b)(1988) permits suits against the United States for damages "...for injury or loss...in accordance with the law of the place where the act or omission occurred." FTCA provides that the United States "shall be liable in [tort claims] in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. § 2674. This express waiver of sovereign immunity is rendered meaningless by application of the discretionary function exception to the facts of this case. Under 28 U.S.C. § 2680 (a), "(a)ny claim based upon an act or omission of an employee of

the Government, exercising due care, in the execution of a statute or regulation...or based upon the exercise or performance...[of] a discretionary function or duty" remains barred by sovereign immunity. Issues of fact exist as to whether DOJ or SSA violated or failed to perform a nondiscretionary duty or function in this case, and it was error to dismiss the KOLOKOFFS' claim on this basis.

In 1976, when Arthur Katz was admitted to the Federal Witness Protection Program, the authorizing act was Title IV of the Organized Crime Control Act, Pub.L.No. 91-452 Section 502, 84 Stat. 933. Administrative procedures were also established by the DOJ, pursuant to the Justice Department Order OBD 2110.2: Witness Protection Maintenance Policy and Procedures. The early administrative procedures established an admissions process and minimum

background information which was required to be assessed for all entrants into the program.

While there were few written policies and procedures dictating the conduct of the DOJ under the early Witness Protection Act, more explicit requirements were established after Kane's admission into the program, which standards should be applied to this case as DOJ continued Kane's protection in the WSP after the 1984 Amendment. Shortly after his entry in the program, DOJ required Kane to execute a Memorandum of Understanding advising him that the United States would refuse to protect him from claims of creditors and that he was required to settle civil obligations in advance of entering the program (R. 32). It also informed the witness that any involvement in criminal activity after admission into the program would result in immediate termination from the Witness Protection Program (R. 32). Despite the DOJ's actual notice that Arthur Kane was

involved in ongoing criminal and fraudulent activity, it failed to apply its nondiscretionary policy and terminate Kane for involvement in criminal activities after his admission.

In 1984, the original Witness Protection Act was repealed and the Program was significantly reformed by the Witness Security Reform Act of 1984, effective October 1, 1984 (Pub.L.No. 98-473, Title II, Part F, Subpart A, Sections 1207-10, 98 Stat. 2153-63 (creating 18 U.S.C. § 3521-28)(1984). The Witness Security Reform Act of 1984 imposed new duties on the Justice Department to assess a person's suitability for inclusion in the Program and obtain a criminal history and psychological evaluation of the person. The Act required the Attorney General to make a written assessment in each case of the seriousness of the investigation or case in which the potential witness' testimony would be provided as well as other factors including the potential

harm to innocent victims. The Reformed Act of 1984 also required the Attorney General to enter into a Memorandum of Understanding like the one entered into between Kane and DOJ, setting forth the requirements that a protected witness not commit any crime, and comply with legal obligations and civil judgments against that person, to be entitled to continued protection. Id. at 18 U.S.C. § 3521(c)(d)(1). DOJ, in direct violation of the duties imposed by the Reformed Act of 1984, continued Arthur Kane's protection in the Witness Protection Program without performing a psychological evaluation or a written assessment of the appropriateness for continuing Kane's protection. There is nothing in the statute which states that it applies only to witnesses admitted after the statute's effective date and not to witnesses who are provided continued protection after the effective date.

In Berkovitz v. United States, 486 U.S. 531 (1988), this Court determined that the discretionary function exception to FTCA did not bar a suit against the United States for negligently licensing a private laboratory to produce an oral polio vaccine and subsequently approving the release of a specific lot of the vaccine to the public. The Court held that the proper test is whether the governmental action complained of is a matter of choice for the acting employee. "...[C]onduct cannot be discretionary unless it involves an element of judgment or choice." Id. at 536. Since "discretion" in a broad sense is involved in all decisions and choices, the key is whether the conduct involves a policy judgment. The exception does not apply "if the acts complained of do not involve permissible exercise of policy discretion." Id. at 546. Where there is a specific statutory or regulatory directive, there is no discretion to deviate from mandated procedure, and the discretionary function will

not bar such a claim. Id. at 542-44. The KOLOKOFFS submit that the claim made here did not involve an element of judgment or choice, and further, the acts complained of did not involve a permissible exercise of policy discretion. The policy of the WSP is not to provide a haven for criminals to carry out civilly and criminally fraudulent schemes while being shielded by the United States. The Memorandum of Understanding the government had Arthur Katz sign expressed that the new identity provided him could not be used for his own personal gain. The stated purpose of the WSP was to provide security for Government witnesses and members of their families whose lives or persons were placed in danger because of their being witnesses in proceedings against persons alleged to be involved in organized criminal activity. The United States did not meet its burden of proof to show that there was no substantial issue of material fact that the action or inaction of the

United States involved purely discretionary functions. There was no evidence below that the USMS made a policy judgment or weighed the need to continue providing protection and anonymity to Arthur Kane and his family against the safety of the general public and specifically those individuals such as KOLOKOFF who might have dealings with this dangerous convicted felon.

In Berkovitz, this Court rejected the argument that the discretionary exception precludes liability for all acts arising out of the regulatory programs of federal agencies. Id at 538. Yet this was precisely the argument made and accepted below without even evaluating the tortious conduct the KOLOKOFFs claim was involved here. Even if the decision to enact the witness security program is immune from tort liability, the negligent administration of the program once adopted is not.

While other circuit courts have held that the discretionary function exception bars suits against the

United States for illegal acts committed by federally protected witnesses, the Supreme Court has not yet decided this important issue. Piechowicz v. United States, 885 F.2d 1207, 1213 (4th Cir. 1989); Jet Industries v. United States, 777 F.2d 303, 306 (5th Cir. 1985), cert. denied, 476 U.S. 1115, 106 S.Ct. 1971, 90 L.Ed. 2d 655 (1986); Taitt v. United States, 770 F.2d 890, 893 (10th Cir. 1985); Bergmann v. United States, 689 F.2d 789, 793 (8th Cir. 1982). None of the cases have addressed whether the acts complained of by the KOLOKOFFS, the violation of the express terms of the Memorandum of Understanding, the failure to perform a psychological evaluation or prepare an assessment of the benefits and risks to protecting a potential witness, are nondiscretionary acts subjecting USA to liability under the Federal Tort Claims Act. More particularly, none of the cases involve the continued protection of a witness despite his ongoing criminal and fraudulent activity while

in the program, and the KOLOKOFFS believe this is a case of first impression.

At the trial court hearing, it was incumbent upon USA to show that DOJ had blanket immunity from liability for negligent decisions to admit and failing to terminate Arthur Kane from the WSP despite his criminal acts and defrauding of creditors before and after his admission. From its inception, the WSP has never been designed to shield criminals from ongoing criminal behavior, without any consideration of the public safety and welfare. DOJ's decision to continue providing protection for Arthur Kane violated nondiscretionary statutory mandates. There is a substantial issue of material fact as to whether the DOJ complied with its nondiscretionary functions at all, and if so, whether it was negligent in carrying out its functions, which precluded the entry of the order of dismissal.

CONCLUSION

Based on the foregoing facts and authorities, the Petitioners LLOYD KOLOKOFF and WANDA KOLOKOFF, respectfully pray that a writ of certiorari by granted.

Respectfully submitted,

THE VOGELSANG LAW FIRM
Attorneys for the Petitioners
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(305) 441-6611

By: _____
BETH TYLER VOGELSANG

CERTIFICATE OF MAILING

I HEREBY CERTIFY that a true and correct copy of the foregoing was hand delivered to Acting United States Attorney for the Southern District of Florida at 155 S. Miami Avenue, Miami, Florida 33130, on this ____ day of April, 1992.

THE VOGELSANG LAW FIRM
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By: _____
BETH TYLER VOGELSANG

APPENDIX A

Appendix A

Opinion of the United States Court of Appeals for the Eleventh Circuit 1

Judgment of the United States District Court for the Southern District of Florida 2

Docket sheet of the United States District Court for the Southern District of Florida 3

Appendix 1

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 91-5187

District Court No. 90-991-CIV-JWK

LLOYD KOLOKOFF, WANDA KOLOKOFF,

Plaintiffs-Appellants,

vs.

UNITED STATES OF AMERICA,

Defendant-Appellee.

Appeal from the United States District
Court for the Southern District of Florida

(January 14, 1992)

Before EDMONDSON and DUBINA, Circuit Judge, and ATKINS*, Senior District Judge.

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*Honorable C. Clyde Atkins, Senior United States District Judge for the Southern District of Florida, sitting by designation.

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 91-5187

D.C. Docket No. 90-991-CIV-JWK

LLOYD KOLOKOFF, WANDA KOLOKOFF,

Plaintiffs-Appellants,

vs.

UNITED STATES OF AMERICA,

Defendant-Appellee.

Appeal from the United States District
Court for the Southern District of Florida

Before EDMONDSON and DUBINA, Circuit Judge, and ATKINS*, Senior District Judge.

J U D G M E N T

This cause came to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby AFFIRMED;

IT IS FURTHER ORDERED THAT Plaintiffs-Appellants pay to Defendant-Appellee, the costs on appeal to be taxed by the Clerk of this Court.

_____

Honorable C. Clyde Atkins, Senior U.S.
District Judge for the Southern District
of Florida, sitting by designation

Entered: January 14, 1992
For the Court: Miguel J. Cortez, Clerk

By: _____
Deputy Clerk

PER CURIAM:

While we doubt that the intentional tort exception applies, we still AFFIRM for the other reasons states by the District Court. The Judgment of the District Court is AFFIRMED.

Appendix 2

UNITED STATES DISTRICT
COURT SOUTHERN
DISTRICT OF FLORIDA

CASE NO. 90-991-CIV-KEHOE

LLOYD KOLOKOFF and
WANDA KOLOKOFF,

Plaintiffs,

vs.

UNITED STATES OF AMERICA,

Defendant.

ORDER GRANTING MOTION TO DISMISS AND/OR FOR SUMMARY JUDGMENT

THIS MATTER arises upon the hearing held December 10, 1990, on the motion of the Defendant, United States of America ("USA"), to dismiss and/or for summary judgment on a variety of grounds. The Plaintiffs seek recovery against the United States Department of Health and Human Services, Social Security Administration ("SSA"), for negligence in failing to warn the Plaintiff of the suicidal and/or homicidal

tendencies of Arthur Kane, an SSA employee who shot Plaintiff Lloyd Kolokoff, and in failing to notify the United States Marshal Service or local police of those tendencies on Kane's part. In addition, the Plaintiffs seek recovery against the United States Department of Justice ("DOJ") for negligence in admitting Kane into, and maintaining him in, the USA's witness protection program and in failing to warn the public and those in daily contact with Kane of his suicidal and/or homicidal tendencies.

The USA asserts, first, that the Plaintiffs' claims should be dismissed for lack of subject matter jurisdiction. The Complaint predicates subject matter jurisdiction on the Federal Tort Claims Act ("FTCA"). FTCA confers subject matter jurisdiction over personal injury claims against the United States for negligence on the part of a government employee "under circumstances where the United States, if a private person, would be liable to the Claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. § 1346(b). This

limited waiver of sovereign immunity does not apply, however, to claims based on the "exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused." 28 U.S.C. § 2680(a). Because the selection and supervision of participants in the Federal Witness Security Program are discretionary functions, the Court concludes that this exception applies to the Plaintiffs' allegations that the DOJ was negligent in the selection, supervision and maintenance of Kane as a participant in the Federal Witness Security Program, as well as in the failure to warn the public about Kane. See Piechowicz v. United States, 885 F.2d 1207, 1213 (4th Cir. 1989); Taitt v. United States, 770 F.2d 890, 893 (10th Cir. 1985); Jet Industries, Inc. v. United States, 777 F.2d 303, 306 (5th Cir.), cert. denied, 476 U.S. 1115, 106 S.Ct. 1971, 90 L.Ed.2d 655 (1986). Despite the Plaintiffs' assertions that Kane, who entered the Program

in 1976, should have been reevaluated or terminated based on guidelines established by the Witness Security Reform Act of 1984, the Plaintiffs have offered no support for the retroactive application of the new guidelines. Indeed, even assuming their applicability, the new requirements appear to remain discretionary, in providing that information relating to an individual's suitability for the program should be obtained by the Attorney General "to the extent practicable." 18 U.S.C. § 3521(c). Further, the Attorney General is required to disclose the identity or location of a protected witness only when he/she is under investigation for, or arrested or charged with, a crime punishable by more than a year in prison or a crime of violence. 18 U.S.C. § 3521 (b)(1)(G). In the present case, Kane had not been under investigation for, or arrested or charged with, a crime, but rather had been sued civilly for fraud on two occasions. Finally, the 1984 Act expressly prohibits the imposition of any civil liability based on the Government's

decision to provide witness protection. 18 U.S.C. § 3521(a)(3).

The Court additionally determines that the claim against the SSA is likewise barred, since the decision by Kane's supervisor whether to warn the Plaintiff and notify law enforcement authorities about Kane's state of mind was purely discretionary. See, e.g., Mercado Del Valle v. United States, 856 F.2d 406, 408 (1st Cir. 1988).

The USA seeks dismissal on the additional ground that the Court lacks subject matter jurisdiction pursuant to the intentional tort exception of FTCA. This exception provides that the sovereign immunity waiver of FTCA does not apply to "[a]ny claim arising out of assault, battery..." 28 U.S.C. § 2680(h). In the present case, the Plaintiffs' claims appear to arise out of the assault and battery committed on Plaintiff Lloyd Kolokoff. The Supreme Court has ruled, however, that where the USA negligently allows a foreseeable assault and battery to occur, the intentional tort exception is inapplicable.

Sheridan v. United States, 487 U.S. 392, 108 S.Ct. 2449, 2454, 2455, 101 L.Ed.2d 352 (1988). The negligence involved, however, must amount to breach of a duty which is independent of that employment relationship. Id. at 2455. The only duties alleged by the Plaintiffs in the present case which arguably are independent of the employment relationship are the duty to warn the Plaintiffs or to notify law enforcement officers of Kane's suicidal and/or homicidal tendencies. Upon careful review, the Court concludes that neither the SSA nor the DOJ had an independent duty to warn or to notify. Pursuant to Florida law, "there is no common law duty to prevent the misconduct of third persons." Trianon Park Condominium Asso. v. Hialeah, 468 So.2d 912, 918 (Fla. 1985). Moreover, Kane's governmental employment did not amount to a special relationship giving rise to a duty to warn or to notify. Kane's assault and battery was committed outside the scope of his employment, and the government had neither the right nor the ability to

control Kane, as well as no awareness of a foreseeable, identifiable victim. Under these circumstances, no special relationship existed between the Plaintiffs and the SSA and/or DOJ, or between Kane and the SSA and/or DOJ. See Vic Potamkin Chevrolet, Inc. v. Horne, 505 So.2d 560, 562-563 (Fla. 3d DCA), approved, ctfd. quest. ans., 533 So.2d 261 (Fla. 1988); Garrison Retirement Home Corp. v. Hancock, 484 So.2d 1257, 1261 (Fla. 4th DCA 1985). Accordingly, given the absence of a duty independent from Kane's employment relationship, the Court finds that jurisdiction is barred on the basis of the intentional tort exception to FTCA.

The USA's final basis for dismissal and/or summary judgment is that the Plaintiffs have failed to state a claim for negligence, based on the absence of a duty cognizable under state law. Because this Court has ruled, supra, that it lacks subject matter jurisdiction, it need not reach the USA's additional assertion that dismissal is warranted for failure to state a claim. Nevertheless, the Court's ruling

above that the USA owed no duty to the Plaintiffs is dispositive of the USA's additional contention that the Plaintiffs have failed to state a claim for negligence based on the absence of a state law duty. Accordingly, summary judgment is appropriate on this ground, as well.[1]

In light of the foregoing, it is hereby

ORDERED and ADJUDGED that the USA's motion to dismiss and/or for summary judgment is GRANTED.

DONE and ORDERED in Chambers at Miami, Florida this 7th day of February, 1991.

James W. Kehoe
U.S. District Judge

cc: Beth Tyler Vogelsang, Esq., Lisa A. Hirsch, Esq., AUSA, Arnold Aikens, Esq., AUSA.

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[1]Because matters outside the Complaint were submitted in connection with the instant motion to dismiss and/or for summary judgment for failure to state a claim, the Court treats the motion as one seeking summary judgment, see Fed.R.Civ.P. 12(b), and resolves it pursuant to the standard enunciated by the Supreme Court in Celotex Corp. v. Catrett, 477 U.S. 316, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).

Appendix 3

DATE	NR	PROCEEDINGS
1990		
APR 25	1	Complaint
25	2	Summons issued as to Social Security Administration
25	3	Summons issued as to Assistant Attorney General
25	4	Summons issued as to US Attorney
MAY 2	5	Affidavit of service of summons exec 4/26/90 as to Social Security Administration thru Mercedes Rodriguez, Agent
2	6	Affidavit of service of

			summons exec 4/26/ 90 as to US Attorney thru Robert, Sr. Asst. US Atty.
	21	7	Return of service of summons exec 5/2/90
JUN	25	8	Unopposed motion for enlargement of time to serve response to complaint by Defendant
	29	9	Order (JWK 6/29/90) granting unopposed motion for extension of time and Defendant may respond on 7/25/90 (EOD 7/9/90-CCAP)
JUL	25	10	Answer to complaint

			and affirmative defenses by Defendant
	30	11	Notice setting cause for trial 11/19/90 and calendar call on 11/15/90 at 9:00 a.m.
OCT	05	12	Motion to file memo in excess of page limitations by Defendant
	05	--	Motion to dismiss and or for summary judgment by Defendant
	18	13	Unopposed motion for enlargement of time to serve memo and documents in opposition to motion to dismiss and summary judgment by Plaintiffs

18	14	Unopposed motion to continue trial by Plaintiff
18	15	Notice of filing answers to interrog-atories by Plaintiff Wanda Kolokoff
18	16	Notice of filing answers to interrog-atories by Plaintiff Lloyd Kolokoff
18	17	Notice of taking deposition duces tecum of E.J. Breda, Richard Schaumburg, Gerald Shur, David B. Helfrey, Albert Wicks, Rube Robinson, Harold Sair, Doris

			Wiley, Bill D. Williams, Arthur Daniels, William D. Hall, Ken Ronsi, Philip Rucker and Charles Lenoir on 10/26/90 by Plaintiffs
	25	18	Memo in opposition to motion to dismiss and for summary judgment by Plaintiffs (with exhibits)
	26	19	Order (Fam 10/25/90) denying without prejudice Plaintiff's motion to continue trial (EOD 10/30/90-CCAP)
NOV	05	20	Reply to memo in

		opposition to motion to dismiss and summary judgment by Defendant
05	21	Motion for leave to file amended answer by Defendant
07	22	Order (JWK 11/7/90) granting Plaintiffs motion for enlargement of time up to 11/5/90to file memo and other documents in opposition to motion to dismiss and summary judgment (EOD 11/14/90-CCAP)

07	23	Order (JWK 11/7/90) granting Defendant's motion to file memo in excess of 20 pages (EOD 11/14/90-CCAP)
07	24	Motion to dismiss or for summary judgment by Defendant
08	25	Motion to stay discovery pending ruling on motion to dismiss and or summary judgment by Defendant
13	26	Order (JWK 11/7/90) denying Plaintiffs motion for continuance of trial (EOD

		11/15/90-CCAP)
28	27	Notice of taking deposition of Joseph Scott at 10:00 a.m., Richard Gourley at 12:00 p.m., Kenneth Clarkson, Ph.D. at 2:00 p.m. and Luir R. Pagon, MD at 4:00 p.m. on 11/28/90 by Plaintiffs
28	28	Notice of taking deposition of Gerald Shur at 10:00 a.m., Jerry Bullock at 1:00 p.m. and Eugene Wesley, Jr., at 4:00 p.m. on 11/29/90 by Plaintiffs (original

			pleading not signed)
	28	29	Notice of taking deposition of Harold Sair at 2:00 p.m. and Arthur Daniels at 4:00 p.m. on 11/30/90 by Plaintiffs (original pleading not signed)
DEC	05	30	Request foir copies of all documents pursuant to Defendant's subpoena duces tecum by Plaintiff L. Kolokoff
	05	31	Order (JWK 12/5/90) granting Defendant's motion for leave to file amended answer and amended answer may be filed (EOD

		12/11/90-CCAP).- unable to locate
07	32	Notice of filing memo of understanding by Plaintiff
07	33	NOtice of taking deposition of Arthur Daniels on 11/6/90 by Plaintiffs
10	34	Minutes of hearing on motion to dismiss on 12/10/90
12	35	Notice of taking deposition of Joseph Scott and Richard Gourley on 12/11/90 by Plaintiffs
17	36	Notice of taking deposition of Gerald

			Shur at 11:00 a.m. and Harold Safir at 2:30 p.m. on 1/20/90 by Plaintiffs
	18	37	Renotice of taking deposition of Harold Safir at 11:00 a.m. and Gerald Shur at 2:30 p.m. on 12/20/90 by Plaintiffs
	21	38	Unopposed motion for protective order by Defendant
1991			
FEB	07	39	Order (JWK 2/7/91) granting USA's motion to dismiss and or summary judgment

			(EOD 2/11/91-CCAP-M)
MAR	07	40	Notice of appeal by plaintiffs from order granting motion to dismiss and or for summary judgment (copies to USCA Atty. of record) (Fee paid #114978)
	15	--	Acknowledgement of receipt of NOA (USCA #91-5187)
APR	29	41	Transcript of hearing on 12/10/90, pages 1-19